

STATE OF MICHIGAN  
COURT OF APPEALS

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TIMOTHY KING, Successor Personal  
Representative of the Estate of ANDREW  
BAKER,

Plaintiff-Appellant,

v

McPHERSON HOSPITAL, a/k/a TRINITY  
HEALTH-MICHIGAN, MICHAEL BRIGGS,  
D.O., MERLE HUNTER, M.D., and  
EMERGENCY PHYSICIANS MEDICAL  
GROUP, P.C.,

Defendants-Appellees.

FOR PUBLICATION  
October 19, 2010

No. 284436  
Livingston Circuit Court  
LC No. 04-020535-NH

Advance Sheets Version

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Before: K. F. KELLY, P.J., and MARKEY, O'CONNELL, TALBOT, WILDER, MURRAY, and FORT  
HOOD, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority that plaintiff diligently pursued his rights and arguments up and down the judicial system, including an appeal to our Supreme Court. I also concur with the majority and the panel in *King v McPherson Hosp*, 288 Mich App 801 (2010) (*King I*), that a limited application of the now famous order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins III*), is “unfair” and, in my opinion, will result in a miscarriage of justice.

I write separately to state that the majority opinion misconstrues both the scope and purpose of the Supreme Court’s order in *Mullins III*. The *Mullins III* order was *not*, as the majority opinion speculates, an “intervening change of the law.” The law remained the same after the effective date of the *Mullins III* order as it was before the *Mullins III* order was entered. In this regard, the order was an extraordinary edict from our Supreme Court.<sup>1</sup> Rather than limit

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<sup>1</sup> Because the Supreme Court’s order in *Mullins III* did not change the current state of the law, the majority’s reliance on well-written cases such as *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653; 633 NW2d 1 (2001), and *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008), is misplaced.

the *Mullins III* order to a select group of plaintiffs, I would apply the *Mullins III* order to all litigants unceremoniously thrown off the litigation train before receiving their day in court. This is how the *Mullins III* order was intended to be applied and how the *King I* panel applied this order. I see no justice or equity in creating two classes of plaintiffs and then unjudiciously picking which class of plaintiffs will have their day in court and which class of plaintiffs will be denied their day in court. To operate in such a manner is to re-create the same firestorm that generated the *Mullins III* order in the first place.<sup>2</sup>

## I. HISTORY OF THE *MULLINS* ORDER

In reality, the Supreme Court's order in *Mullins III* operates as a pardon for those plaintiffs who failed to timely discern the ramifications of the Supreme Court's decision in *Waltz v Wyse*.<sup>3</sup> The *Mullins III* order recognized the difficult time this Court experienced interpreting the current state of medical-malpractice law. It also recognized that numerous plaintiffs, through no fault of their own, had lost their ability to pursue their causes of action. In *McLean v McElhaney*, 269 Mich App 196, 207-208; 711 NW2d 775 (2005) (O'CONNELL, P.J., dissenting), rev'd 480 Mich 978 (2007), I metaphorically described the confused state of the law as follows:

The finest legal augur with the keenest sight and all the birds in the autumn sky could not have anticipated *Waltz's* outcome with enough certainty to provide rudimentary counsel to a prospective client. This analysis would also lead to the conclusion that equity forbids retroactive application of *Waltz*.

Undeniably, *Omelenchuk* [*v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000)] stood as an unchallenged and clear pronouncement of the controlling timetables until *Waltz* changed them. Plaintiffs responded to the original schedules by timely arriving at the station, buying an outrageously expensive ticket, and boarding the correct train. Fueled by even more money, the litigation engine pulled smoothly out of the station and chugged its way up to speed. Now *Ousley* [*v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004)] ceremoniously presents plaintiffs with the Supreme Court's newly revised timetables; paternalistically explains to them how, under the new schedules, they were technically tardy to the station; warmly apologizes for the fallibility and humanness of the legal system; and demands that we unceremoniously throw plaintiffs from the speeding train. I do not see any justice or equity in this course of action. *Ousley* should be disregarded, *Waltz* should only receive prospective application, and I would reverse.

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<sup>2</sup> Ironically, four of the Court of Appeals judges involved in the current dispute (Judge DONOFRIO on the *King I* panel and Judges K. F. KELLY, O'CONNELL, and TALBOT on this special panel) were also involved in the *Mullins* appellate decisions.

<sup>3</sup> *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

It is important to remember that every judge on this Court experienced some difficulties in attempting to follow the then current state of medical-malpractice law. Because of these difficulties, Judge FITZGERALD and I declared a conflict with *Ousley* in the majority opinion in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448 (2006) (*Mullins I*). Our Court then voted to convene a conflict panel and vacated part of the *Mullins I* opinion, and, in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) (*Mullins II*), the conflict panel produced four separate, divergent opinions. I believe it is fair to say that even the conflict panel was conflicted. Unfortunately, the *Mullins II* majority sidestepped the substantive analysis of the issue raised in *Mullins I* (whether *Waltz* should be applied prospectively or retroactively) and chose to resolve the case on the basis of a series of nonbinding remand orders the Supreme Court had issued, leaving both the bench and bar in a state of confusion.<sup>4</sup> After the aborted attempt in *Mullins II* to resolve the retroactivity issue, I described the chaotic situation in *Ward v Siano*, 272 Mich App 715, 721-722, 744; 730 NW2d 1 (2006) (O'CONNELL, J., concurring), rev'd 480 Mich 979 (2007):

The issue that truly ignited the firestorm was the related holding that because MCL 600.5852 was a “saving provision,” the medical malpractice tolling provision, MCL 600.5856, did not toll it. *Waltz*, [469 Mich] at 655. This was an issue of first impression on a settled area of law whose resolution would ordinarily be limited to prospective application. See *Pohutski v City of Allen Park*, 465 Mich 675, 696-697; 641 NW2d 219 (2002); *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004). It was not a nominal extension of understood principles, but the plowing under of familiar and common legal concepts and the reversal of years of standard practice. The ingrained nature of the pre-*Waltz* approach to tolling statutes, saving statutes, and other extensions of limitations periods, can best be seen by considering the legal concepts that developed along the way.

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With more than 60 cases involving *Waltz* issues in various stages of the appellate process, the time is ripe for the Supreme Court to address the substantive issue presented to the *Mullins II* conflict panel. Without a plenary discussion of the issues, we are left only with the remand orders. In my opinion, only a learned and exhaustive opinion will amicably put these and other unsettled issues to rest. I would simply ask that the Supreme Court grant leave to appeal in

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<sup>4</sup> *Mullins II*, 271 Mich App at 506-509, quoting *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005), *Evans v Hallal*, 472 Mich 929 (2005), and *Forsyth v Hopper*, 472 Mich 929 (2005). The confusion then turned to whether the Supreme Court's remand orders were binding on this Court.

one of these cases and resolve the issue of whether *Waltz* should be applied prospectively or retroactively.<sup>[5]</sup>

## II. THE SUPREME COURT'S EDICT

*Mullins II* was appealed to the Supreme Court, which resulted in an end to the chaos and produced the now famous *Mullins III* edict:

We reverse the July 11, 2006, judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we remand this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order. Reported below: 271 Mich App 503. [*Mullins III*, 480 Mich at 948.]

The Supreme Court order did not change the law; instead, it created a window in which *Waltz* did not apply retroactively. In my opinion, the Supreme Court order applies to all plaintiffs who were dispatched to the dustbin.<sup>6</sup> All plaintiffs who were properly on the litigation train and who properly exhausted all their appellate remedies should get their tickets stamped and be placed back on the litigation train with full rights and privileges. As the *King I* panel stated, "The Supreme Court in its use of the words, 'any causes of action' did not limit the palliative nature of its order to only those cases still pending." *King I*, 288 Mich App at 810.<sup>7</sup>

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<sup>5</sup> In my concurring opinion in *Ward*, I requested that the Supreme Court grant leave to appeal to determine the propriety of prospective or retroactive application of *Waltz*. It appears that the *Mullins III* order was the response to this request. In my opinion, the *Mullins III* order is an astonishing statement by our Supreme Court. It was a bold, assertive order issued to correct a wrong turn by this Court. The Supreme Court should be commended for their foresight; in one paragraph they devised the perfect solution for the then existing problem.

<sup>6</sup> I note that the *King I* opinion and the *Mullins III* order do not fit into the category described as conventional legal analysis. Both are extraordinary statements that were made to afford justice to those plaintiffs who failed to comprehend the significance of *Waltz*.

<sup>7</sup> I am puzzled at the majority's attempt to place a square peg in a round hole. This type of thinking is what caused the chaos in the first place. See *Ousley*, 264 Mich App 486.

I concur with the result reached in the *King I* opinion. I would reverse the decision of the trial court.<sup>8</sup>

/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood

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<sup>8</sup> As evidence of the complexity of this issue, I note that those Court of Appeals judges who have opined on the *King* case are split five to five: five judges favor limited application of the *Mullins III* order, and five judges favor applying the *Mullins III* order to all litigants who are denied their day in court.